No. 487

Supreme Court of the United States

October Term—1944.

JOSEPH T. WATERS,

Petitioner,

AGAINST

KINGS COUNTY TRUST COMPANY,

Respondent.

Petition, Brief and Appendix in Support of Application for Writ.

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INDEX.

CASES CITED.

AUTHORITIES AND STATUTES CITED.

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PETITION FOR WRIT OF CERTIORARI.

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Joseph T. Waters respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

Petitioner seeks to review a judgment dismissing his complaint after verdict in an action to recover $25,000.00 damages for breach of contract of employment as a broker. Jurisdiction was based on diversity of citizenship.

The principal issue contested upon the trial related to petitioner's claim that he was employed as a broker for the purpose of finding a purchaser of the stock of Red Star Towing & Transportation Company (and an affiliated dry-dock company) of which respondent, as a trustee of two estates, was the principal stockholder (pp. 289, 308).

Respondent, in support of its contentions that it did not thus employ petitioner, introduced in evidence (p. 147), over objection (pp. 146-149) its own diary of transactions affecting said estates, covering a period of over four months (Deft's Exh. A, pp. 318-345). Petitioner contends that this diary was a self-serving instrument, the most damaging of whose entries were made at the very time when a possible claim by petitioner was contemplated; that it was not admissible as a business record under the Business Records Act (28 USCA, §695),* and that its admission in evidence violated the principles enunciated by this Court in *Palmer* v. *Hoffman,* 318 U. S. 109.

This exhibit consisted of separate, typewritten sheets of legal cap, which were kept in the folder of the estate (605). The contents had been dictated either by Mr. Lambrecht, the respondent's trust officer, or by Mr. Allen, its Vice-President, both of whom had conducted the negotiations with petitioner (fol. 440). After being typed, it was subsequently corrected and edited by the insertion of marginal notes and interlineations (pp. 148-9). Although it is dated chronologically, there are many gaps in the entries, and some of the conceded transactions that took place with the petitioner, and that became important upon the trial, were entirely omitted (fols. 437, 471-2, 503, 626-7, 695-8).

Except for a few limited matters, such as the submission of an account to the court, the decree of the court, etc., which were strictly required to be placed in the diary or history sheet, the man in charge of the estate was supposed to put in only what he himself regarded as "important", and he was supposed to "boil down" the important things, as his "discretion" and care would dictate (fols. 435, 437, 503, 697-8). The entries particularly objected to were written at the very time when the respondent was fearful that the petitioner might assert a

*See Appendix.

claim for commissions, as will appear from some of the entries themselves (fols. 1008-1010, 1017).

It is petitioner's claim that the diary as a whole was highly damaging. However, to keep this petition within limits, only two of the most prejudicial entries will be discussed, *i. e.* those of March 5th and 6th, 1941. On March 3rd petitioner procured an offer to pay $485,000 cash from his customer, Newtown Creek Towing Corporation (pp. 99-100, 172, 193), and respondent received, on March 4th, an offer from one Sanders, the President of the Red Star Company, who was concededly acting as a dummy for a third party (p. 183) to purchase at ostensibly the same price (p. 336). On March 5th, Mr. Lambrecht and Mr. Allen consulted the Bank's attorneys, Messrs. Schmid and Tobias, of Wrenn & Schmid, with reference to a possible liability to petitioner herein if a sale was made to Sanders, instead of to the Newtown Creek Company, and the following entry was made in this diary, Exhibit A (pp. 336-7):

> "Mar. 5. Mr. Allen, Mr. Schmid, Mr. Tobias and Mr. Lambrecht met today and discussed the possible effect of the offers of Newtown Creek Towing Company and Mr. Sanders for the Red Star and College Point companies and our liability with respect to commissions and the payment of bonus to employees, etc. At the conclusion of the conference, Messrs. Wrenn & Schmid advised that, in their opinion, they believe the executors may reject the offer of the Newtown Creek Towing Company and accept the offer of Mr. Sanders without incurring any liability for brokerage to the broker who represented the Newtown Creek Towing Company. This advice was given after reading our correspondence on the matter and detailed oral report of Mr. Allen and Mr. Lambrecht."

In addition to the objection made to the diary as a whole, as self-serving, this particular entry was objected to (pp. 148-9, fols. 442, 446), but the Court ruled—erroneously, as petitioner will show in his brief—that the entry was proper as showing that respondent acted in good faith, having taken the advice of counsel (fol. 447).

The entry of March 6th was equally damaging, particularly that portion which refers to a conversation which allegedly occurred with petitioner's attorney, Mr. Ives (p. 339; fol. 1017):

> "I reiterated we had not engaged anybody to negotiate a sale of our stock of the Red Star and College Point companies, and that from the very beginning, I had so indicated to Mr. Waters, and that he represents the buyer and not the Trust Company *et al.* as agent, broker or otherwise."

These entries, if believed by a jury, were irreparably prejudicial to the petitioner's claim of employment.

The learned Circuit Court of Appeals has sustained the admissibility of the record on the untenable and wholly unprecedented ground that the business of a corporate trustee justifies the establishment of a practice of keeping detailed records of day by day events affecting its trusts, and that records so kept are made "in the regular course of business", and admissible under the Business Records Act—which ruling it did not consider inconsistent with that made by this Court in the case of *Palmer* v. *Hoffman, supra* (p. 356).

Because the diary was held admissible as a business record, the Court did not pass upon respondent's contention that petitioner had opened the door to its use for explanatory purposes by introducing in evidence Exhibit 12, a history sheet dated February 18th, 1941 (adm. p. 81; pp. 294, 323-8). Nevertheless, the annexed brief will show that that contention is untenable. For the purposes of

this petition it is sufficient to point out that there is not a word contained in Exhibit A that in any sense explains or qualifies the admissions made by the respondent more than two weeks earlier in Exhibit 12, and particularly is this so with reference to the entries of March 5th and March 6th, which are so highly prejudicial; nor was Exhibit 12 a part of Exhibit A; nor was the latter offered or admitted for the purpose of explaining or qualifying Exhibit 12. Yet if admissible at all, it could only have been admitted to explain and not as it was admitted, as independent evidence.

The petitioner also contended in the courts below that in accordance with the adjudicated law of New York, he was entitled to a directed verdict, since he had conclusively established both his employment and his performance. The Circuit Court of Appeals, in overruling this contention, held that a question of fact existed as to whether petitioner was employed as a broker or was merely invited to submit offers. Yet, as appears from the annexed brief, this distinction, according to the New York appellate courts, is a distinction without a difference, since it has been held that an invitation to a broker, to submit offers, in itself constitutes employment. As a matter of fact, Mr. Allen, respondent's Vice-President, admitted that he went further than merely to invite the submission of offers, having expressly authorized the petitioner to attempt to find a purchaser for the stock (pp. 199-200, fols. 596-9). Therefore it is petitioner's contention that in denying the motion for a directed verdict, the courts below have disregarded the controlling law of New York.

B.

Jurisdiction.

The jurisdiction of this Court is invoked under §240(a) of the Judicial Code (28 USCA, §347[a]).

C.

The Questions Presented.

1. Was Defendant's Exhibit A properly admissible as a business record, pursuant to 28 USCA, §695*, and if so, does that necessarily make all entries therein admissible, even though they are hearsay, irrelevant and incompetent?

2. Was not the proof such that the plaintiff was entitled, under the established law of New York, to a directed verdict?

D.

The Reasons Relied on for the Allowance of the Writ.

1. The Circuit Court of Appeals has decided an important question of Federal law, interpreting a Federal Statute of importance, probably in conflict with an applicable decision of this Court, although the precise question has not been, but should be, settled by this Court. The decision of this Court in *Palmer* v. *Hoffman,* 318 U. S. 109 (affg. 129 Fed. 2d 976, C. C. A. 2) clearly excludes the possibility of admitting a diary kept, maintained and prepared, as this one was, not for the systematic conduct of the respondent's business as a business, but for convenience in meeting claims; a diary prepared moreover, in the immediate shadow of such a claim, by a person interested in the negotiations, who was authorized, in making the entries, to give his own interpretation, to make his own selection of events and conversations, to boil down those things which he himself considered important, and to discard the rest, guided only by his own discretion and care.

*See Appendix.

If the *Palmer* case cannot be construed as directly in point because it involved not a diary but a sworn report made by an employee in the regular course of business, then it is respectfully urged that a review should still be granted, since this decision, for the first time in judicial history, so far as petitioner can find, opens the door to the free use by parties of their own diaries, even though they are prepared by self-interested corporate trustees and similar institutions, under circumstances in which self-interest would transcend any passion for accuracy. "Such a major change, which opens wide the door to avoidance of cross-examination" (per Douglas, *J.*, at 318 U. S. 113), should not be accomplished without the full stamp of approval of this Court.

2. The Circuit Court of Appeals has rendered a decision in conflict with a decision of the Fifth Circuit, which has held that even where a record is properly admissible as a business record, that does not *ipso facto* make all entires therein contained properly admissible if otherwise objectionable (*Lykes Brothers S. S. Co.* v. *Grubaugh*, 128 Fed. 2d 387, 390). In that case the Fifth Circuit held, per Hutcheson, *J.*, that although a hospital record was generally admissible as a business record, that did not permit the use in such record of an opinion not amounting to a diagnosis. The entry of March 5th in Exhibit A gives the opinion of counsel, allegedly rendered to respondent, which was specifically objected to (p. 149), and the diary as a whole contains hearsay, irrelevant and incompetent entries, which were also objected to (p. 148). The opinion herein ignores petitioner's contentions with respect thereto.

3. The Circuit Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions. In holding that it was proper to deny a motion for a directed verdict because

there was an issue of fact as to whether the plaintiff was employed or merely invited "to submit offers", the opinion ignores the fact that it had already been held in New York, whose law was applicable, that a mere invitation "to submit offers" constitutes employment (*Shapiro* v. *Greenwich Savings Bank,* 266 App. Div. 359, unanimously affirmed without opinion, 293 N. Y. ..... The affirmance by the Court of Appeals was called to the attention of the Circuit Court of Appeals by the petition for rehearing, which was denied (pp. 358, 367). The undisputed evidence given by respondent's Vice-President that he expressly authorized petitioner to attempt to find a purchaser for the stock went much further than the evidence which was held sufficient to constitute employment in the *Shapiro* case.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and to send to this Court, for its review and determination, on a day certain to be named therein, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 329, October Term, 1943, *Joseph T. Waters, Plaintiff-Appellant,* against *Kings County Trust Company and William Howard Barber, Defendant-Appellees,* and that said judgment of the United States Circuit Court of Appeals for the Second Circuit may be reviewed by this honorable Court, and that your petitioner may have such other and further relief in the premises as to this honorable Court may seem meet and just.

Dated, New York, September 14th, 1944.

JOSEPH T. WATERS,

By SIDNEY S. BOBBÉ,
Counsel for Petitioner